MINING ACT, 1973.

RECORD OF FINDINGS BY J.L. McMAHON, CHIEF WARDEN.

IN THE MATTER OF THE MINING ACT, 1973, AND A MINING LEASE APPLICATION NO. 26 COFFS HARBOUR LODGED BY RUTILE AND ZIRCON MINES (NEWCASTLE) LTD. OBJECTOR BILL WRIGHT (TAREE) PTY. LTD.

28-5-80

WARDEN: This has been an application for the award of costs pursuant to Section 146 of the Act. For convenience, in these findings, I refer to Rutile & Zircon Mines (Newcastle) Ltd., as "Rutile" which company was represented before me by Mr. Hamman, of Counsel, and to the objector Bill Wright (Taree) Pty. Ltd. as "Wright", Mr. Hamilton, also of Counsel appearing for that party.

Mr. Hamman has raised an objection to my jurisdiction and I propose to deal with that before proceeding further. It is, however, necessary for me to outline some of the history of the matter, in respect of which no dispute exists. Both Counsel have argued the matter before me on 1st April, 1980 and I have since been supplied with written submissions from Mr. Hamman.

By document dated 6th January, 1978, lodged with the Mining Registrar on the ninth day of that month, Rutile made an application pursuant to Section 43 of the Act for a Mining Lease. The land the subject of the application was private land, and Wright was the owner of some of it. The land is approximately one kilometer south of the village of Old Bar which itself is some fifteen kilometers from Taree on the mid-north coast of New South Wales. The minerals sought were rutile, zircon, ilmenite and monazite, by dredging methods.

As required by Section 41 of the Act, Rutile furnished notice of the application to Wright and on 6th February,1978, Wright objected to the application pursuant, inter alia, to the provisions of Section 112 of the Act. The appropriate fee was lodged with the application. The grounds of the objection under Section 112, were that a business of supplying sand was being carried on by Wright and the application would greatly affect the business both operationally and economically. Subsequently some of the land was acquired on behalf of the Planning and Environment Commission under the Coastal Lands Protection Scheme, but some was still held by Wright, which maintained its objection.

Section 112 (3) provides for a reference by the Minister to the Warden for Inquiry and report as to the grounds of an objection and the direction has been made to myself under that Section to inquire into the objections lodged, and also under Section 178 of the Act, to inquire into any other matters considered relevant to me.

The holding of the Inquiry was listed to commence on 4th March, 1980, and letters taking the form of notice of hearing were sent out specifying the 4th March at Taree as being the time and venue of the holding of the Inquiry. In addition both parties, through their solicitors, approached me and some subpoenas were issued returnable on 4th March.

On 3rd March advice was received from Rutile that it desired to withdraw its application as to the lands of Wright. The holding of the Inquiry did not take place and Rutile agreed to inform in writing the Under-Secretary of the Department of Mineral Resources of its intention to withdraw the application. Rutile or its representatives had informed Wright and it's Attorney and Counsel of the intention to withdraw the application on either late on Friday 29th February or early on Monday 3rd March, 1980.

To date no Inquiry has been held on the basis that I was waiting to be informed by the Under-Secretary of the receipt of the notice of withdrawal which Rutile indicated that it would forward. However, Rutile never at any time between 3rd March, 1980, and 1st April, 1980, on which latter date the legal argument as to jurisdiction was raised before me, informed the Under-Secretary of the withdrawal.

As to the rights of an applicant to withdraw an application under the Act, Section 9 makes it plain that it can be done. It provides:-

"9. (1) An application under Part IV or Part V may be withdrawn by the applicant's lodging with the appropriate person a notice of withdrawal.

(2) The withdrawal of an application pursuant to subsection (1) is irrevocable.

(3) For the purposes of subsection (1), the appropriate person is -

(a) in the case of an application under Part IV, the mining registrar with whom the application is lodged; and

(b) in the case of an application under Part V, the Under Secretary."

However, Section 48, envisages the case where the Minister, by instrument in writing direct that part of the area of land covered by an application be excluded from the application. Section 48 provides:-

"48. (1) The Minister may, by instrument in writing, direct that any part of the area of land to which an application for an authority relates shall be excluded from the application and -

(a) in a case where the Minister so specifies in the direction - that part shall be deemed to have been excluded from the application when it was lodged; and

(b) in any other case - that part shall be excluded from the application from and including the date of the direction,

and the application shall relate and, in a case referred to in paragraph (a), shall be deemed always to have related, to the remaining part of that area.

(2) A copy of a direction given by the Minister under subsection (1) shall be served on the applicant for the authority."

As at 1st April, 1980, there has been neither action under Section 9 nor Section 48 to exclude Wright's land from the application, either by total or partial withdrawal.

On 26th March I was approached by Mr. Hamilton to list the matter solely on the question of costs. I acceded to his request and the matter was listed before me at Taree on 1st April, 1980.

So much of an outline of the relevant history of this matter. Mr. Hamman at the outset raised the question of my jurisdiction to hear Wright's application for costs, in connection with the Inquiry which has never been held. Where a hearing was arranged on 4th March and the other side was not informed until either 29th February or 3rd March, a weekend intervening, that the basis of the hearing, i.e., the application, had been withdrawn, it is reasonable to assume that there would have been some preparation by both the applicant and objector, necessitating expenditure of moneys.

As to the meaning of costs I am of opinion that these can include fees for Counsel and Attorney, court fees, disbursements and witnesses' expenses reasonably and necessarily incurred in connection with the preparation for and presentation of court actions. The power of a Warden to award costs is contained in Section 146 of the Act. It provides:-

"146. The costs of all proceedings under this Act before the warden (whether in the warden's court or otherwise), shall be in the discretion of the warden and the amount thereof may be determined by the warden or taxed, as the warden may direct."

Elsewhere in the Act some provision is made for costs, for example, under Section 125 (1)(c), although it is my view that that particular paragraph relates only to adjournment of hearings relative to assessments of compensation.

So it seems to me that I must look to Section 146 for guidance in deciding this matter of jurisdiction towards costs. That Section is contained in Part IX of the Act which is headed at Section 128 "Legal Proceedings". I see some benefit in making it obvious that I have looked at the question as to whether an Inquiry under Section 112 or Section 178 is a "proceeding" under the Act.

The Mining Act, 1973, like its predecessor the 1906 Act contains a mixture of provisions relative to Wardens. It is apparent from what fell from the Superior Courts in this State and from the High Court that it was recognised that under the 1906 Act a Warden could act either ministerially or judicially. Indeed, the High Court in Wade -v- Burns (1) held that mandamus should go to a Warden requiring him to consider an application which was obviously an exercise of an administrative function, such decision being somewhat of a departure from earlier criteria. Over the years various functions under the 1906 Act were held to be merely administrative, for example, granting or refusing of an application for authority to enter - Wallamaine Colliery Pty. Ltd. -v- Cam & Sons Pty. Ltd. (2); confirming Wake -v- Murphy (3); applications to suspend labour conditions adopting to mining titles - Minerals Recovery Pty. Ltd. -v- Broken Hill Pty. Co. Ltd. (4); complaints alleging failure to comply with labour conditions under Section 124A - Lougher -v- Bender (5); and granting or refusing of permission to construct a road - Calendonia Collieries Ltd. -v- Holland (6). In all of these latter cases there is the comment that the respective matters were not "proceedings" as envisaged by the 1906 Act to make decisions by Wardens appellable to Higher Courts.

In my opinion a similar situation exists under the 1973 Act. Under that Act, a Warden is given the dual role of acting both administratively and judicially. For instance, under Part IX, Section 128 et. seq. he has clearly a judicial role having jurisdiction to hear and determine various suits relating to the rights of miners as against each other for mining connected debt, trespass, damage and rights. See for example Sections 133 and 144. A right of appeal is there allowed under Section 152 to the District Court and Section 159 to the Supreme Court, the latter being by way of case stated. The Warden makes a determination of proceedings in the same way as any other judicial officer. However, at other places in the Act it is required that the Warden perform other functions, for example, under Sections 77 and 79, each subsection (4), the Minister is to give a decision "after Inquiry and report" by the Warden. In that context the Warden is acting in an administrative capacity in making a report to the Minister.

It is his duty on these occasions to have a fact finding function and to submit the results of these Inquiries to the Minister but it is then a matter for the Minister's decision, not the Warden's, and the Minister may accept or refuse to accept the findings of the Warden or act in some other way altogether within the confines of the Act. So it follows in my opinion that Inquiries held by the Warden under Sections 112 and 178 are performed by him in furtherance of his administrative capacity. Clearly then these are not proceedings within the meaning of "legal proceedings" as in Part IX and therefore do not come within the ambit of the appellate provisions of Sections 152 and 159.

But the matter does not there end. Section 146 speaks merely of "proceedings" and not legal proceedings as the heading within Part IX mentions. The Shorter Oxford English Dictionary defines proceedings, among other things, as "the instituting or carrying on of an action at law; a legal action or process; an act done by authority of a court of law; any step taken in a cause by either party". On a reading of Section 146 it seems to me that the legislature was at pains to include all types of actions conducted by the Warden. The fact that the word "proceedings" is mentioned does not mean, in my view, that it is restricted to legal proceedings under Part IX. The bracketed words "whether in the Warden's Court or otherwise" convey to me that it was deliberately meant that costs could be awarded by the Warden in relation to any of the administrative functions which he performs, in addition to the power to award costs when sitting in a Warden's Court. In my view he can make a parallel finding as to costs at an appropriate time when he is performing an administrative function. I am fortified in this opinion by the words "under this Act" in Section 146. Had it been meant that only Part IX proceedings were to be the subject of the power to award costs, then the words would have been "under this Part". The fact that Part IX contains provisions applicable to matters other than in that part is demonstrated further by a reading of Section 164 which is contained in Part IX but which refers to a person being guilty of contempt of a Warden's court, or of a Warden sitting in the discharge of any functions under this Act.

I am of opinion that the Warden can award costs in regard to both his administrative and judicial roles under the Act.

I turn then to the fact that Rutile has now indicated through Mr. Hamman that it intends to withdraw its application either as to Wright's land, or if necessary as to all land covered by the application and I note and accept his professional undertaking that his instructions are that withdrawal will take place within seven (7) days. However, as at 1st April, 1980, the application for a Mining Lease No. 26 was still current and I was still in receipt of a direction from the Minister to hold an Inquiry under Sections 112 and 178 of the Act in regard to certain objections raised to the application. The only reason

why the matter has not been listed for hearing of the Inquiry is administrative convenience, in that it has been indicated that the application would be withdrawn and I was waiting for that action.

But let me suppose for a moment that it had already been withdrawn as to Wright's land but gazettal had not taken place. What then would have been the proper course of action? While section 48 of the Act gives the Minister, in my view, a discretion as to whether or not to issue the instrument giving the direction that certain land be excluded, I can find nothing in the Act to provide that an objection once lodged and acted upon under section 112 (3) by the Minister can be withdrawn without the necessity of the Warden holding the Inquiry under section 112. The contrary suggests itself to me, that is, that section 112 requires the holding of an Inquiry and necessary action under subsection (8) once an objection is lodged, a direction under subsection (3) is given to a Warden, and in the absence of any action by the Governor to refuse the application under subsection (4). There is no limitation on the informality of the Inquiry but in my view an Inquiry there must be, unless the Governor has acted under subsection (4). I should comment that it is obvious from the facts in this matter that no action under subsection (4) has been taken.

An "authority" under the Mining Act, 1973, includes a mining lease by virtue of the definition in section 6 (1). Section 20 (1)(b) provides for notification of the withdrawal or refusal of an application for an authority or for the renewal of an authority being published in the gazette. Section 6 (5) provides as follows -

> "For the purposes of this Act an application for an authority is pending from the date and hour on which the application is lodged under this Act until the date when -
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> (a) notification of the withdrawal of the application if published in the gazette pursuant to Section 20;
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> (b) notification of the refusal of the application is published in the gazette pursuant to Section 20; or
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> (c) the authority applied for has affect, as provided in Section 64."

My attention has been invited to a decision of the Full Court of the Supreme Court of Queensland on 10th May, 1979, in the matter of Mining Warden at Gladestone ex parte Midcoast Lands Pty. Ltd. (7). In that recent case a Warden had found he had no jurisdiction to award costs and the Full Court, finding a regulation to be ultra vires the Act,

held this to be the case. The Queensland legislation under which this decision was handed down makes provision for a Warden to hear lease applications and objections thereto and a notice of abandonment of an application for a lease means in effect an end to the application. A Warden is functus officio from the moment notice of the abandonment is given to him. The Queensland case is somewhat different to the one before me in that the granting or refusing of an application for a lease in New South Wales is not one for a Warden but is entirely for the Minister and the Crown. As I have said in order to implement their decision the Full Court held a regulation to be ultra vires. Significantly in New South Wales provision for the making of applications, the lodgment of objections, the withdrawal of applications, the hearing and the award of costs comes from the Act and not from the regulations. There is some matter relevant to Inquiries under Section 112 of the Act in the regulations, e.g., Regulation 45, but all major provisions are in the Act itself.

It seems to me that there is a clear distinction between the principles as laid down in the Midcoast Lands case, and the tenour of the New South Wales Mining Act. While the Full Court in Queensland spelt out that once notice of abandonment is received the application is at an end, the New South Wales Act provides, quite differently and specifically, that receipt of notification is not an end to an application and only gazettal of the withdrawal, or other action is the terminating point of the life of the application.

In a written submission dated 8th April, 1980, kindly made to me by Mr. Hamman, he raised the argument that it would be plainly ludicrous for costs to be awarded in an Inquiry conducted by a Warden after reference to him by the Minister where the Minister had refused the application despite the Warden's findings and report, that is, a party may appear to be successful before the Warden but the Minister may decide the application for reasons other than the facts found by the Warden or the Warden's recommendations. I comment that if a Warden were minded to award costs to a person or corporation whom he thought to be the successful party in an Inquiry, he ought not do so until the Minister's decision was known following receipt of the Warden's report. In this way no injustice would be done.

No actual hearing of an Inquiry has been held, nor indeed is it likely to be held in view of the intention of Rutile to withdraw its application, and Mr. Hamman has strongly argued that without the hearing the Warden ought not be able to award costs. While the direction from the Minister to a Warden under Section 112 is the basis for the Inquiry, the listing of it for hearing, that is, setting down of the date and venue, is one for the Warden. This Inquiry was formally listed for hearing on 4th March, 1980, and notices as to that hearing specifying a date and venue were sent out. The fact that the hearing did not take place

merely to meet the convenience of one of the parties to the proceedings, and I use the word deliberately does not mean that the Inquiry was not in train once the date and venue of the hearing had been set. In my view once these matters were established the proceedings had commenced and I am of opinion that they may attract the award of costs.

I hold therefore that a Warden has jurisdiction to hear an application for costs notwithstanding that a hearing by way of Inquiry has not been actually held as at this date and if Mr. Hamman's instructions as to withdrawal are correct, may never be held.

My attention has been drawn to the fact that since 1st April, 1980, certain correspondence has been received by the Department of Mineral Resources in which Rutile seeks to withdraw the application, but no gazettal has yet taken place as to withdrawal. I am satisfied that jurisdiction rests with a Warden to award costs in this matter.

(1) 115 C.L.R. 537
(2) 77 W.N. 854
(3) 33 W.N. 151
(4) 85 W.N. Part 1 N.S.W. 1
(5) 54 W.N. 96
(6) 45 W.N. 66
(7) 1979 Qd.R. 427